Ruling with Law. On the Significance of Rules of Organization and Procedure

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Terminology first[1]

Legal work is linguistic work; legal problems are therefore more often than not terminological in nature. This is true not only for the detailed norms and provisions of criminal law, tax law or civil law, but for public law too. Among the various sources and forms of public law – federal, state and local, constitution, statutes and ordinances – constitutional law naturally reigns supreme. Its supreme nature does not protect the constitution from terminological ambivalence though, in fact, the opposite is true. In order to perform its functions as the paramount law of the land, the constitution necessarily ought to strive for a certain amount of linguistic flexibility and vagueness. Of course, this leaves any analysis or application of constitutional law with the somewhat ominous task of interpreting and inferencing the actual wording of constitutional provisions. Among the many ambivalences of constitutional vagueness is what in Anglo-American constitutional thought is referred to as the "rule of law". pointing its

[1] This contribution remains in the form of my original lecture. I therefore make scarce use of references, mostly where they serve to verify quotations. Important input stems from the works of the German scholar Eberhard Schmidt-Aßmann on constitutional and particularly administrative law. Arguments drawing upon democratic and constitutional theory are inspired by works of the German constitutional scholar Martin Morlok.

essence is challenging. The same is true for the German term Rechtsstaat (Art. 20 § 1, 28 § 1 of the German constitution (GG), which – in a literal translation – reads "state of law". It has literal siblings in French (État de droit) and Italian (stato di diritto) that basically lean on the legal tradition of the German term, that in essence stems from 19th century constitutional thought.[2] Among many others, Immanuel Kant and Wilhelm von Humboldt contributed ground-breaking philosophical thoughts, Lorenz von Stein and Robert von Mohl contributed legal explications of the concept. How to distinguish the Anglo-American concept of rule of law from the continental tradition of Rechtsstaat is, in the words of Gustavo Gozzi, "una disputa senza fine".[3]

In this contribution, I will therefore not focus on that particular debate with its at times rather subtle differentiations. Instead I would like to address some broader aspects of the matter, therein applying a more generalized concept of Rechtsstaat. It aims at outlining some fundamental aspects, some of which I think are overlooked in their significance for a political system that aims to be constitutional and "lawful" in nature. Therefore I will somewhat arbitrarily use Rechtsstaat and rule of law synonymously.

Key Aspects of Rule of Law and Rechtsstaat

Both concepts obviously showcase "law" as the central aspect of the political and maybe even the social system they are applied to. Law in both concepts serves different purposes. It serves as binding mechanism for any yielding of public authority. In this sense law constitutes and apportions competencies and capacities to public institutions and organizations. For example: Lately, disputes on what intelligence agencies may or may not do nationally or internationally have been on the agenda in the United States, Great Britain, Germany and France. May the American National Security Agency (NSA) spy on government officials of allied states (or do they even reciprocate?). Obviously, the constitutional super-subject of separation of powers heavily relies on legal provisions either of constitutional or statutory nature.

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[2] See Alemann in this volume.

[3] Gozzi (2003), 260.

But of course, there is more to law. At the same time it serves as a means of orientation for public action of any nature. This is particularly true for constitutional provisions that influence the application of statutory law, be it public or private. In this context, fundamental rights and freedoms are of utmost importance because not only do they guide and limit the legislative branch, but the executive and judicial branch as well.

Both rule of law and Rechtsstaat in their traditional sense come with a twist that on a terminological level is all but obvious. "Law" in both contexts claims a somewhat exclusive position. Not only does it bind public authority by forbidding any arbitrariness in yielding its power. It also limits ideological usurpation of the law, be it of religious, political or other nature. It therefore does not come as a surprise that for example the former socialist German Democratic Republic (GDR) strongly kept its constitutional scholars from drawing upon the bourgeois concept of Rechtsstaat. Instead, they came up with what became known as "sozialistische Gesetzlichkeit" (socialist lawfulness).[4] Public authority was not only to abide by the laws but also by the will of the party and its officials. Deviating from the law and its basic values in order to fulfil political requirements was expected of everyone applying the law.

In the Neighborhood: Constitutional Affinities of the Rule of Law

The anti-ideological bias of the traditional concepts of rule of law and Rechtsstaat of course reveal their own ideological roots. They are, as constitutional concepts, not neutral in the sense that they can be used to describe any system that runs along the lines of written legal provisions. Instead, they are constitutional concepts of liberal political systems which dominate the western hemisphere. At the core of those systems lies an unwavering, almost radical belief in the individual and his freedoms, in his prerogative of choice how to conduct his life, how sociable or introvert his acts, which beliefs are held and which purpose of life is chosen. We find that idea enshrined in various constitutional and quasi-constitutional provisions, among them the American Declaration of Independence and the German constitution. The American Declaration of Independence dates from 1776 and famously declares: "We hold these

[4] Mollnau (1999), 59 ff.; Stolleis (2009).

truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness". In a simpler, more legalistic way, Art. 1 § 1 GG prescribes:

"Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt (Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority)."

Western constitutionalism therefore puts emphasis on the constitutional rank of human rights. Interpretation of human rights-provisions is a chief concern of constitutional scholarship and constitutional practice alike. It is therefore hardly surprising that public debates of Rechtsstaat and rule of law often concentrate on human rights, their legal guarantees and their efficacy in day-to-day state practice. And of course, human rights are at the core of any political system that considers itself a Rechtsstaat. The individualistic approach is often related to the constitutional concept of democracy, basically claiming that violations of human rights are in essence undemocratic. The conceptual background of the assumption is rather exacting and is rarely made explicit in public debates. It basically relies on the philosophical concept of constitutional contractualism according to which the guarantee and efficacy of human rights are a prerequisite of one's entering into the social contract. Whereas this assumption is equally true for any form of government that draws upon the contractual motive, it is particularly important to a democracy. It serves to prevent – as John Stuart Mill in his reflections "On Liberty" put it – a "tyranny of the majority". That is to say, that any true democratic form of government needs to put in effect a working means of protecting the individual's freedoms or it cannot be called democratic.[5]

It becomes clear that democracy and the rule of law are intimately intertwined in terms of the guarantee of human rights. Yet, their specific perspectives differ. The significance of human rights in respect to the democratic idea is of a more institutional nature whereas the perspective of rule of law is more of an individual nature, focusing on the actual efficacy of human rights-guarantees. To put it differently: Whereas the democratic approach asks if human rights are guaranteed, the Rechtsstaat-approach asks how they are guaranteed. This brings us back to the fundamental assumptions of the rule of

[5] Morlok/Michael (2015), 136.

law and to its conceptual presuppositions. From German constitutional scholarship stems the distinction of two dimensions of a Rechtsstaat, one being more formal and the other being more substantive or – in German – "materiell" (the term "materiell" refers to the content, the essence, the subject matter of a norm, to what the rule is about).

In it is reflected a development of legal thought that occurred between the 19th and 20th century: The dominating perspective of legal thought in the 19th and the early 20th century was legal positivism. Positivism did not very much care about the objectives of a legal system, of what the law was used to achieve. In positivistic thinking, law was legitimate as long as it originated from the power constitutionally authorized to make law (i.e. the monarch or parliament). All public authority, namely the executive and the judicial branch, had to do was to enact the will of the legislator. This of course raises the question of how to provide for means and measures for those branches to effectively enact the legislative program. Given the case of Germany, the experience of the formally legal Nazi Dictatorship, but also other historical events of the 20th century led to a decline in positivistic thinking. Substantive perspectives gained ground – and for good reasons. The international scope and depth of the human rights-debates is only comprehensible against the back-drop of the historic experiences of the 20th century.

Yet, along with the popularity of more substantive views goes an undeniable neglect of the more formal aspects of the rule of law, which are particularly interesting for countries in transition to a system of rule of law. So, what needs to be kept in mind is that running a state by the rule of law has to distinguish between the outcome of public decision making (i.e. in the form of laws, executive orders or judicial decisions) and the way the decision was made. Whereas the outcome-perspective raises substantive questions i.e. on how individual rights are affected, the formal perspective focuses on aspects of the decision making. Now, what are those formal aspects?

Dull but Decisive? Organization and Procedure

Three Aspects to Consider

When concentrating on the more formal aspects of a Rechtsstaat, three aspects come into sight, in descending levels of abstraction: questions of legitimacy of

law (as dealt with above regarding positivism), the distinction between constitutional and statutory law and the means of organization and procedure.

The positivist approach basically provides a scheme of legal legitimacy: Not what the law is about matters, but whether or not it was given by the legitimate body. And although we have since come further in our idea of legal legitimacy, the initial idea of positivism is of course still correct. Therefore, what can be said today is that law is legitimate as far as it originates from a constitutionally authorized legislator (often, though by far not exclusively, parliament) and stays within the constitutional limits (mostly, but not exclusively human rights as granted by the constitution in question).

This scheme works well as long as we operate on the basis of a highly simplistic understanding of what law is. When we perceive laws as rules void of linguistic ambivalence and discretionary elements, we need not worry about their proper application. Yet, any law is full of both, voluntarily and involuntarily. This makes the application of law a treacherous business, full of possibilities to undermine the will of the legislator (or the will of the law itself, depending on one's methodological perspective) or even consciously deviating from it. This affects a fundamental objective of law in general that lies within the idea of law's generality: Equality of application. Law as we understand it is only legitimate if its application fulfils standards of equality. The law itself must provide that those standards are met.

Another aspect needs to be considered: Simply put, we like public action to be right. That is to say that we expect a certain level of rationality in whatever the state decides to do. The sources of rationality are twofold: They comprise the law itself as the normative standard of rationality; the law says what's right and what's not. Yet, the law's normative claim is not independent, it does not exist in itself, but naturally relates and relies on certain facts, which have to be considered, which are sometimes contested and ultimately need to be proven by the parties involved, be they private or public.

All this shifts the general focus away from the provisions of the constitution because its provisions conventionally do not deal with details of public power-yielding. Instead, what comes into sight are statutory rules made by parliament as the key legislator. Those statutory rules of course have to address an abundance of different forms and contexts in which public power is yielded. They have to address both administrative as well as judicial action. They need to be adequate in the sense that they need to meet the above mentioned stand-

ards. At the same time, they need to provide for a sufficient level of effectiveness of public actions. Of course, our desire is to achieve just and factually adequate decisions, but in due time and form.

Altogether, questions arise as to how to organize public authority and how to equip public authority with procedures and forms of public action that provide for the meeting of those standards. This, of course, is a highly demanding task to complete and confronts any legislator with challenges that might seem insurmountable. Given the example of Germany, legal scholarship and legal practice have worked decades to develop a somewhat coherent system of rules of organization and procedure. And yet, debates on how to reform and develop namely administrative law have been on the agenda for over twenty years now. European unification puts additional pressure on the structures and institutions developed. I will for reasons of efficiency concentrate on aspects of executive administrative law.

Specialization as an Organizational Principle

A key aspect of public authority in a Rechtsstaat is the fashion in which it is organized. Organization in this sense pertains to executive structures along the lines of specialization and hierarchy. If rationality is a desirable aspect of public decision making, specialization obviously serves this purpose: By limiting an agency's competencies to certain areas of the law (for example education, welfare, and public safety) public officials can develop expertise not only in respect to the laws to be applied, but a factual expertise, too. The importance of a proper assessment of facts can hardly be overestimated in the application of any law. Experienced judges or agency officials often can assess the legal gravitas of a case based on the way and which facts are presented by the parties.

In addition, specialization in the sense of exclusive administrative competencies furthers the cause of separation of powers within the executive branch of government because it limits the access of public officials to a closely defined area of the law. At the same time, expertise not only heightens the standards of rationality, but also serves the purpose of equal application of the law, because a smaller number of people deal with certain fields of law. Sub-legal standards and guidelines of interpretation and application of legal provisions can develop, practically "legalizing" informal expertise gathered by public officials in a certain field of law.

Hierarchy and Oversight as Organizational Principles

Another important feature of organizing public authority is different hierarchic levels. In Germany, administrative structure on the level of the federal states usually is threefold. Many of the executive branch's tasks are fulfilled on the local level or the "county"-level (the so called Kreise). The highest level is usually a minister (secretary) of the state government. The intermediary level, mostly called Bezirksregierungen (which loosely translates to district government) mostly serves as a secondary administrative level, in some cases though as the primary administrative agency.

Closely tied to the idea of hierarchic organizational patterns are of course mechanisms of review and supervision/oversight. Seemingly similar, the difference is that review is instigated by the private individual raising objections for example against a license permitting the erection and operation of an industrial plant (so called Widerspruchsverfahren). Although measures of administrative review have in recent years been abolished in some German federal states in favor of immediate judicial review, administrative review remains a vital part of the German administrative system. Supervision/oversight (Aufsicht), in contrast, is not (formally) initiated by the private individual, but by the superior administrative level.[6] German administrative law differentiates two forms of supervision, depending on different levels of intensity. Legal supervision (Rechtsaufsicht) is limited to merely rebuke violations of the law but needs to refrain from rebuking aspects of expediency of an administrative decision. In contrast, the so called Fachaufsicht (technical supervision) is free to act also upon its own ideas of expediency.

Independent Agencies

Exceptions to the rule of review and supervision are independent agencies that do not answer to a superior administrative level. The German national bank (Bundesbank) is an example of a (constitutionally) independent body (Art. 88 GG). The same is true for the European Central Bank. Two motives for independent administrative bodies, lately advanced by European Union law,[7] arise. The more prone administrative functions are to political interference, the more important are mechanisms securing the administrative process. Secondly, the

[6] Kahl (2000); Pieper (2006).

[7] Kröger/Pilniok (2016).

closer an administrative body serves the usage and expression of fundamental freedoms, the more independent its actions need to be (such as: broadcasting institutions, data protection agencies). Yet, independent agencies need to be the exception to the rule of effective administrative supervision. Not only do they raise questions in terms of the rule of law, but the democratic legitimacy of independent agencies is at stake, too.[8]

Rules of Procedure

Organizational aspects aside, rules of procedure play a prominent part safeguarding administrative decision making. "Rules of procedure" in this context serve as an umbrella-term. It includes all rules pertaining to administrative procedure in particular, to the parties involved and to administrative forms of action.

Legitimacy by Procedure

Rules of procedure are of utmost importance to any administrative system under the rule of law. Procedural provisions mainly serve to produce legitimacy of administrative decisions.[9] Often, administrative law does not determine legal consequences in detail but instead establishes discretionary decisions to be made by the respective administrative body. This results in legal uncertainty. Given the situation of several options available, procedural measures (for example of inclusion of parties affected by the decision) help to raise acceptance of a decision even if the outcome is not favorable for the affected party. Procedure therefore serves to change a situation of uncertainty into a situation of acceptable certainty.

Types and Objectives of Procedural Rules

Administrative procedures are structured and measured actions to obtain and process information.[10] Depending on the scope and the impact of the respective administrative decision (for example: licensing an industrial plant vs. issuing a driver's license), the preceding procedure needs to be adjusted accordingly: Whereas issuing a driver's license usually depends on fairly simple and easy-to-

[8] Hoffmann-Riem (2010).

[9] Luhmann (2005).

[10] Schmidt-Aßmann (2006), 305.

prove prerequisites, licensing an industrial plant is by far more complex. This of course must lead to more complex procedures involving various stakeholders and the interests they represent. Also, the complexity of matters regulated rises and shapes the decision to be made.

Generally speaking, different types of administrative procedures can be distinguished:[11]

- Procedures serving purposes of (quasi-judicial) review of administrative decisions (supervision/oversight).
- Procedures enabling administrative decision-making in individual cases (any form of licensing private actions, granting subsidies or ordering an individual to fulfil certain legal duties, for example).
- Procedures of a more complex nature, spatial planning for example. Namely the latter pose taxing objectives because usually complex nettings of different interests need to be examined and evaluated. Not only does that require comprehensive obtaining of information but also normative standards on how to process the information. Therefore, representation of interest, evaluation of interests and due processing of interests are the core objectives of any administrative procedure.

Depending on the complexity of the matter at hand, procedural provisions can be more or less strict, granting or restricting the administration's leeway in determining the necessary steps to be taken. Generally speaking, a high degree of formality is to be attained with any significant increase in the number of persons involved, the number and rank of legally protected interests and, generally speaking, the more complex the subject matter is. Complicated matters, for example, ask for mandatory hearings, documentation and probably publication of assertions made, deadlines for participatory actions need to be set and administrative decision-making needs to be coordinated with measures of judicial review. Of course, procedure is not a means in itself but serves to enable binding administrative decisions; procedure has therefore to be related to specific forms of administrative action (Handlungsformen).

Forms of Action

Each branch of government acts in particular forms. The legislative branch passes laws, the judicial branch hands down verdicts (procedural actions such

[11] Schmidt-Aßmann (2006), 148 ff.

as subpoenas or interlocutory judgements aside). The executive branch is preoccupied with applying the law in numerous fields. The executive licenses businesses, it issues driver's licenses, it sets up development plans for cities, counties or entire countries, it supervises schools and universities, and it runs museums and public transportation and engages in other businesses. It takes action in individual cases (driver's license, licensing a business) as well as regulating a plurality of cases, for example in passing ordinances. Those forms of actions the executive branch takes differ in scope and impact.

It is a key objective of administrative law to supply the executive branch with adequate forms of action. Not only to fulfil the executive's tasks, but to secure that any form of action recognizes and respects different legal interests involved. Administrative forms of action are therefore inextricably linked to procedural law; they form the decisive part of the administrative process. Administrative law-making therefore needs to identify typical administrative decisions, frame them legally and set up a procedural framework they are linked with. Legally framing procedure and forms of action serves the purpose of rationalizing administrative action. If recurring decisions take the same form and are reached by same or similar procedural actions, they enable the administrative bodies to find solutions to the problems at hand. At the same time, they become easier to control, either by means of supervision or judicial review.

Rules and Procedure in Transitioning Countries

As could be seen, rules of organization and procedure are a worthwhile topic of any state following the idea of rule of law. Rules of organization and procedure serve very important purposes not only in terms of legitimacy and rationality of public action, but also in terms of its efficiency. For countries transitioning to the rule of law, rules of organization and procedure are essential and – from a political point of view – the foremost task to concentrate on.

Conclusion

Although the rationale of legitimacy by procedure is not entirely free of ideological overtones, it comes relatively free of the highly individualistic ideals the western concept of human rights abides by. Rules of organization and pro-

cedure aim at rational public decision making under complex circumstances, they are chiefly instrumental to the aims and objectives of substantive law (materielles Recht). At the same time, they are essential to any system of law that aims to fight despotism and arbitrariness in day-to-day legal work. Therefore, calling for a systematic development of rational procedures is – within reason – compatible with different ideological outlooks on law and its functions. Rules of organization and procedure can help to improve public decision making, largely, though not entirely independent of the contents of those decisions. Besides, the logics of modern bureaucratic states might not differ that much on the local, hands-on level, even if the ideological presumptions of the political system at large are different: Acceptability, reasonability and finally feasibility of administrative decision making are wished for anywhere in the world. At the same time, fighting for a broad guarantee of classical human rights serves little to no purpose if the administrative (and judicial!) structures to effectively implement those rights are not in place.

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